Supreme Court of the United States.

No. 84.—October Term, 1905.

The Union Refrigerator Transit Company, Plaintiff in Error, vs. Commonwealth of Kentucky.	In error to the Court of Appeals of the Commonwealth of Kentucky.

[November 13, 1905.]

This proceeding was begun by a statement filed by the revenue agent of the Commonwealth in the Jefferson County Court, praying that certain personal property belonging to the plaintiff in error be assessed for taxation for State, county and municipal taxes, and be also adjudged to pay a penalty of twenty per cent on the aggregate amount of the tax.

To this statement the Transit Company filed certain demurrers and answers, upon which, and upon the deposition of the controller of the company in St. Louis, Missouri, the case went to a hearing, and resulted in a finding of facts that the Transit Company was the owner of two thousand cars in September, 1897, 1898, 1899 and 1900, to which years the recovery was limited, of the value of $200 each; that its cars were employed by the company by renting them to shippers, who took possession of them from time to time at Milwaukee, Wisconsin, and used them for the carriage of freight in the United States, Canada and Mexico, the company being paid by the railroads in proportion to the mileage made over their lines; that the correct method of ascertaining the number of cars which should be assessed for taxation was to ascertain and list such a proportion of its cars as, under a system of averages upon their gross earnings, were shown to be used in the State of Kentucky, during the fiscal year, the Court finding by this method that there were subject to assessment in Kentucky twenty-eight cars for the year 1897, twenty-nine for the year 1898, forty for the year 1899, and sixty-seven for 1900.

The Court also found that the cars other than those mentioned were not liable to assessment.

The order of the County Court was affirmed by the Circuit Court, and an appeal taken to the Court of Appeals of Kentucky, which reversed the judgment of the Court below, and found that the company was liable to taxation upon its entire number of two thousand cars, and directed the Court below to enter judgment against it for the taxes appropriate to this number. (80 S. W. Rep. 490.)

To review this judgment this writ of error was sued out.

Mr. Justice BROWN delivered the opinion of the Court.

In this case the question is directly presented whether a corporation organized under the laws of Kentucky is subject to taxation upon its tangible personal property, permanently located in other States, and employed there in the prosecution of its business. Such taxation is charged to be a violation of the due process of law clause of the Fourteenth Amendment.

Section 4020 of the Kentucky statutes, under which this assessment was made, provides that "All real and personal estate within this State, and all personal estate of persons residing in this State, and of all corporations organized under the laws of this State, whether the property be in or out of this State, . . . shall be subject to taxation, unless the same be exempt from taxation by the Constitution, and shall be assessed at its fair cash value, estimated at the price it would bring at a fair voluntary sale."

That the property taxed is within this description is beyond controversy. The constitutionality of the section was attacked not only upon the ground that it denied to the Transit Company due process of law, but also the equal protection of the laws, in the fact that railroad companies were only taxed upon the value of their rolling stock used within the State, which was determined by the proportion which the number of miles of the railroad in the State bears to the whole number of miles operated by the company.

The power of taxation, indispensable to the existence of every civilized government, is exercised upon the assumption of an equivalent rendered to the taxpayer in the protection of his person and property, in adding to the value of such property, or in the creation and maintenance of public conveniences in which he shares, such, for instance, as roads, bridges, sidewalks, pavements, and schools for the education of his children. If the taxing power be in no position to render these services, or otherwise to benefit the person or property taxed, and such property be wholly within the taxing power of another State, to which it may be said to owe an allegiance and to which it looks for protection, the taxation of such property within the domicile of the owner partakes rather of the nature of an extortion than a tax, and has been repeatedly held by this Court to be beyond the power of the Legislature and a taking of property without due process of law. (*Railroad Company* v. *Jackson*, 7 Wall. 262; *State Tax on Foreign-held Bonds*, 15 Wall. 300; *Tappan* v. *Merchants' National Bank*, 19 Wall. 490–499; *Delaware etc. R. R. Co.* v. *Pennsylvania*, 198 U. S. 341, 358.) In *Chicago &c. R. R. Co.* v. *Chicago*, (166 U. S. 226,) it was held, after full consideration, that the taking of private property without compensation was a denial of due process within the Fourteenth Amendment. See also *Davidson* v. *New Orleans*, (96 U. S. 97, 102;)

Missouri Pacific Railroad v. *Nebraska*, (164 U. S. 403, 417;) *Mount Hope Cemetery* v. *Boston*, (158 Mass. 509, 519.)

Most modern legislation upon this subject has been directed (1) to the requirement that every citizen shall disclose the amount of his property subject to taxation and shall contribute in proportion to such amount; and (2) to the avoidance of double taxation. As said by Adam Smith in his Wealth of Nations, Book V, Ch. 2, Pt. 2, "the subjects of every State ought to contribute towards the support of the Government as nearly as possible in proportion to their respective abilities; that is, in proportion to the revenue which they respectively enjoy under the protection of the State. The expense of Government to the individuals of a great nation is like the expense of management to the joint tenants of a great estate, who are all obliged to contribute in proportion to their respective interest in the estate. In the observation or neglect of this maxim consists what is called equality or inequality of taxation."

But notwithstanding the rule of uniformity lying at the basis of every just system of taxation, there are doubtless many individual cases where the weight of a tax falls unequally upon the owners of the property taxed. This is almost unavoidable under every system of direct taxation. But the tax is not rendered illegal by such discrimination. Thus every citizen is bound to pay his proportion of a school tax, though he have no children; of a police tax, though he have no buildings or personal property to be guarded; or of a road tax, though he never use the road. In other words, a general tax cannot be dissected to show that, as to certain constituent parts, the taxpayer receives no benefit. Even in case of special assessments imposed for the improvement of property within certain limits, the fact that it is extremely doubtful whether a particular lot can receive any benefit from the improvement does not invalidate the tax with respect to such lot. (*Kelly* v. *Pittsburgh*, 104 U. S. 78; *Amesbury Nail Factory Co.* v. *Weed*, 17 Mass. 53; *Thomas* v. *Gay*, 169 U. S. 264; *Louisville &c. R. R. Co.* v. *Barber Asphalt Co.*, 197 U. S. 430.) Subject to these individual exceptions, the rule is that in classifying property for taxation some benefit to the property taxed is a controlling consideration, and a plain abuse of this power will sometimes justify a judicial interference. (*Norwood* v. *Baker*, 172 U. S. 269.) It is often said protection and payment of taxes are correlative obligations.

It is also essential to the validity of a tax that the property shall be within the territorial jurisdiction of the taxing power. Not only is the operation of State laws limited to persons and property within the boundaries of the State, but property which is wholly and exclusively within the jurisdiction of another State, receives none of the protection for which the tax is supposed to be the compensation. This rule receives its most familiar illustration in the cases of land which, to be taxable, must be within the

limits of the State. Indeed, we know of no case where a Legislature has assumed to impose a tax upon land within the jurisdiction of another State, much less where such action has been defended by any Court. It is said by this Court in the *Foreign-held Bond case*, (15 Wall. 300–319,) that no adjudication should be necessary to establish so obvious a proposition as that property lying beyond the jurisdiction of a State is not a subject upon which her taxing power can be legitimately exercised.

The argument against the taxability of land within the jurisdiction of another State applies with equal cogency to tangible personal property beyond the jurisdiction. It is not only beyond the sovereignty of the taxing State, but does not and cannot receive protection under its laws. True, a resident owner may receive an income from such property, but the same may be said of real estate within a foreign jurisdiction. Whatever be the rights of the State with respect to the taxation of such income, it is clearly beyond its power to tax the land from which the income is derived. As we said in *Louisville etc. Ferry Co.* v. *Kentucky*, (188 U. S. 385–396): "While the mode, form and extent of taxation are, speaking generally, limited only by the the wisdom of the Legislature, that power is limited by principle inhering in the very nature of constitutional government, namely, that the taxation imposed must have relation to a subject within the jurisdiction of the taxing Government." See also *McCullough* v. *Maryland*, (4 Wheat. 316–429;) *Hays* v. *Pacific Mail S. S. Co.*, (17 How. 596–599;) *St. Louis* v. *Ferry Co.*, (11 Wall. 423, 429, 431;) *Morgan* v. *Parham*, (16 Wall. 471–476.)

Respecting this, there is an obvious distinction between tangible and intangible property, in the fact that the latter is held secretly; that there is no method by which its existence or ownership can be ascertained in the State of its *situs*, except perhaps in the case of mortgages or shares of stock. So if the owner be discovered, there is no way by which he can be reached by process in a State other than that of his domicile, or the collection of the tax otherwise enforced. In this class of cases the tendency of modern authorities is to apply the maxim *mobilia sequuntur personam*, and to hold that the property may be taxed at the domicile of the owner as the real *situs* of the debt, and also, more particularly in the case of mortgages, in the State where the property is retained. Such has been the repeated rulings of this Court. (*Tappan* v. *Merchants' National Bank*, 19 Wall. 490; *Kirtland* v. *Hotchkiss*, 100 U. S. 491; *Bonaparte* v. *Tax Court*, 104 U. S. 592; *Sturges* v. *Carter*, 114 U. S. 511; *Kidd* v. *Alabama*, 188 U. S. 730; *Blackstone* v. *Miller*, 188 U. S. 189.)

If this occasionally results in double taxation, it much oftener happens that this class of property escapes altogether. In the case of intangible property, the law does not look for absolute equality, but to the much more practical consideration of collecting the tax upon such property,

either in the State of the domicile or the *situs*. Of course, we do not enter into a consideration of the question, so much discussed by political economists, of the double taxation involved in taxing the property from which these securities arise, and also the burdens upon such property, such as mortgages, shares of stock and the like—the securities themselves.

The arguments in favor of the taxation of intangible property at the domicile of the owner have no application to tangible property. The fact that such property is visible, easily found and difficult to conceal, and the tax readily collectible, is so cogent an argument for its taxation at its *situs*, that of late there is a general consensus of opinion that it is taxable in the State where it is permanently located and employed and where it receives its entire protection, irrespective of the domicile of the owner. We have, ourselves, held in a number of cases that such property permanently located in a State other than that of its owner is taxable there. (*Brown* v. *Houston*, 114 U. S. 622; *Coe* v. *Errol*, 116 U. S. 517; *Pullman's Car Co.* v. *Pennsylvania*, 141 U. S. 18; *Western Union Telegraph Co.* v. *Massachusetts*, 125 U. S. 530; *Railroad Company* v. *Peniston*, 18 Wall. 5; *American Refrigerator Transit Company* v. *Hall*, 174 U. S. 70; *Pittsburg Coal Company* v. *Bates*, 156 U. S. 577; *Old Dominion Steamship Company* v. *Virginia*, 198 U. S. 299.) We have also held that, if a corporation be engaged in running railroad cars into, through and out of the State, and having at all times a large number of cars within the State, it may be taxed by taking as the basis of assessment such proportion of its capital stock as the number of miles of railroad over which its cars are run within the State bears to the whole number of miles in all the States over which its cars are run. (*Pullman's Car Co.* v. *Pennsylvania*, 141 U. S. 18.)

There are doubtless cases in the State reports announcing the principle that the ancient maxim of *mobilia sequuntur personam* still applies to personal property, and that it may be taxed at the domicile of the owner, but upon examination they all or nearly all relate to intangible property, such as stocks, bonds, notes and other choses in action. We are cited to none applying this rule to tangible property, and after a careful examination have not been able to find any wherein the question is squarely presented, unless it be that of *Wheaton* v. *Mickel*, (63 N. J. Law, 525,) where a resident of New Jersey was taxed for certain coastwise and seagoing vessels located in Pennsylvania. It did not appear, however that they were permanently located there. The case turned upon the construction of a State statute, and the question of constitutionality was not raised. If there are any other cases holding that the maxim applies to tangible personal property, they are wholly exceptional, and were decided at a time when personal property was comparatively of small amount, and consisted principally of stocks in trade, horses, cattle, vehicles and vessels engaged in navigation.

But in view of the enormous increase of such property since the introduction of railways and the growth of manufactures, the tendency has been in recent years to treat it as having a *situs* of its own for the purpose of taxation, and correlatively to exempt at the domicile of its owner. The cases in the State reports upon this subject usually turn upon the construction of local statutes granting or witholding the right to tax extra-territorial property, and do not involve the constitutional principle here invoked. Many of them, such, for instance, as *Blood* v. *Sayre*, (17 Vt. 609;) *Preston* v. *Boston*, (12 Pickering, 12;) *Pease* v. *Whitney*, (8 Mass. 93;) *Gray* v. *Kettel*, (12 Mass. 161,) turn upon the taxability of property where the owner is located in one, and the property in another, of two jurisdictions within the same State, sometimes even involving double taxation, and are not in point here.

One of the most valuable of the State cases is that of *Hoyt* v. *Commissioners of Taxes*, (23 N. Y. 222,) where, under the New York statute, it was held that the tangible property of a resident actually situated in another State or county was not to be included in the assessment against him. The statute declared that "all lands and all personal estate within this State" were liable for taxation, and it was said in a most instructive opinion by Chief Judge Comstock that the language could not be obscured by the introduction of a legal fiction about the *situs* of personal estate. It was said that this fiction involved the necessary consequence that "goods and chattels actually within this State are not here in any legal sense, or for any legal purpose, if the owner resides abroad;" and that the maxim *mobilia sequuntur personam* may only be resorted to when convenience and justice so require. The proper use of legal fiction is to prevent injustice, according to the maxim "*in fictione juris semper æquitas existat.*" See *Eidman* v. *Martinez*, (184 U. S. 581;) *Blackstone* v. *Miller*, (188 U. S. 189, 206.) "No fiction," says Blackstone, "shall extend to work an injury; its proper operation being to prevent a mischief or remedy an inconvenience, which might result from a general rule of law." The opinion argues with great force against the injustice of taxing extra-territorial property, when it is also taxable in the State where it is located. Similar cases to the same effect are *People* v. *Smith*, (88 N. Y. 585;) *City of New Orleans* v. *Meekin*, (3 Ind. 481;) *Wilke* v. *City of Pekin*, (19 Ill. 160;) *Johnson* v. *Lexington*, (14 B. Munro, 648); *Catlin* v. *Hull*, (21 Vt. 152;) *Nashua Bank* v. *Nashua*, (46 N. H. 389.)

In *Weaver's Estate* v. *State*, (110 Iowa 328,) it was held by the Supreme Court of Iowa that a herd of cattle within the State of Missouri, belonging to a resident of Iowa, was not subject to an inheritance tax upon his decease. In *Commonwealth* v. *American Dredging Company*, (122 Pa. 386,) it was held that a Pennsylvania corporation was taxable in respect to certain dredges and other similar vessels which were built, but not permanently retained outside of the State It was said that the non-taxability of

tangible personal property located permanently outside of the State was not "because of the technical principle that the *situs* of personal property is where the domicile of the owner is found. This rule is doubtless true as to intangible property, such as bonds, mortgages and other evidences of debt. But the better opinion seems to be that it does not hold in the case of visible tangible personal property permanently located in another State. In such cases it is taxable within the jurisdiction where found, and is exempt at the domicile of the owner." The property in that case, however, was held not to be permanently outside of the State, and therefore not exempt from taxation. The rule, however, seems to be well settled in Pennsylvania that so much of the tangible property of a corporation as is situated in another State, and there employed in its corporate business, is not taxable in Pennsylvania. (*Commonwealth* v. *Montgomery etc. Mining Co.*, 5 Pa. County Courts Rep. 89; *Commonwealth* v. *Railroad Co.*, 145 Pa. St. 96; *Commonwealth* v. *Westinghouse Mfg. Co.*, 151 Pa. St. 265; *Commonwealth* v. *Standard Oil Co.*, 101 Pa. St. 119.) The rule is the same in New York. (*Pacific Steamship Company* v. *Commissioners*, 46 How. Pr. 315.)

But there are two recent cases in this Court which we think completely cover the question under consideration and require the reversal of the judgment of the State Court. The first of these is that of the *Louisville etc. Ferry Co.* v. *Kentucky*, (188 U. S. 385.) That was an action to recover certain taxes imposed upon the corporate franchise of the defendant company, which was organized to establish and maintain a ferry between Kentucky and Indiana. The defendant was also licensed by the State of Indiana. We held that the fact that such franchise had been granted by the Commonwealth of Kentucky did not bring within the jurisdiction of Kentucky for the purpose of taxation the franchise granted to the same company by Indiana, and which we held to be an incorporeal hereditament derived from and having its legal *situs* in that State. It was adjudged that such taxation amounted to a deprivation of property without due process of law, in violation of the Fourteenth Amendment, as much so as if the State taxed the land owned by that company; and that the officers of the State had exceeded their power in taxing the whole franchise without making a deduction for that obtained from Indiana, the two being distinct, "although the enjoyment of both are essential to a complete ferry right for the transportation of persons and property across the river both ways."

The other and more recent case is that of the *Delaware etc. Railroad Co.* v. *Pennsylvania*, (198 U. S. 341.) That was an assessment upon the capital stock of the railroad company, wherein it was contended that the assessor should have deducted from the value of such stock certain coal mined in Pennsylvania and owned by it, but stored in New York, there

awaiting sale, and beyond the jurisdiction of the Commonwealth at the time appraisement was made. This coal was taxable, and in fact was taxed in the State where it rested for the purposes of sale at the time when the appraisement in question was made. Both this Court and the Supreme Court of Pennsylvania had held that a tax on the corporate stock is a tax on the assets of the corporation issuing such stock. The two Courts agreed in the general proposition that tangible property permanently outside of the State, and having no *situs* within the State, could not be taxed. But they differed upon the question whether the coal involved was permanently outside of the State. In delivering the opinion it was said: "However temporary the stay of the coal might be in the particular foreign States where it was resting at the time of the appraisement, it was definitely and forever beyond the jurisdiction of Pennsylvania. And it was within the jurisdiction of the foreign States for purposes of taxation, and, in truth, it was there taxed. We regard this tax as in substance and in fact, though not in form, a tax specifically levied upon the property of the corporation, and part of that property is outside and beyond the jurisdiction of the State which thus assumes to tax it." The decision in that case was really broader than the exigencies of the case under consideration require, as the tax was not upon the personal property itself but upon the capital stock of a Pennsylvania corporation, a part of which stock was represented by the coal, the value of which was held should have been deducted.

The adoption of a general rule that tangible personal property in other States may be taxed at the domicile of the owner involves possibilities of an extremely serious character. Not only would it authorize the taxation of furniture and other property kept at country houses in other States or even in foreign countries, of stocks of goods and merchandise kept at branch establishments when already taxed at the State of their *situs*, but of that enormous mass of personal property belonging to railways and other corporations which might be taxed in the State where they are incorporated, though their charter contemplated the construction and operation of roads wholly outside the State, and sometimes across the continent, and when in no other particular they are subject to its laws and entitled to its protection. The propriety of such incorporations, where no business is done within the State, is open to grave doubt, but it is possible that legislation alone can furnish a remedy.

Our conclusion upon this branch of the case renders it unnecessary to decide the second question, viz: Whether the Transit Company was denied the equal protection of the laws.

It is unnecessary to say that this case does not involve the question of the taxation of intangible personal property, or of inheritance or succession

taxes, or of questions arising between different municipalities or taxing districts within the same State, which are controlled by different considerations.

We are of opinion that the cars in question, so far as they were located and employed in other States than Kentucky, were not subject to the taxing power of that Commonwealth, and that the judgment of the Court of Appeals must be reversed, and the case remanded to that Court for further proceedings not inconsistent with this opinion.

Mr. Justice WHITE concurred in the result.

Mr. Justice HOLMES:

It seems to me that the result reached by the Court probably is a desirable one, but I hardly understand how it can be deduced from the Fourteenth Amendment, and as the Chief Justice feels the same difficulty, I think it proper to say that my doubt has not been removed.

True copy.

Test:

Clerk Supreme Court, U. S.